



November 15, 2001

Ms. Patsy Spaw  
Secretary of the Senate  
The Senate of the State of Texas  
P.O. Box 12068  
Austin, Texas 78711

OR2001-5287

Dear Ms. Spaw:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154178.

The Secretary of Senate (the "senate") received two requests for a specific investigation. In addition to the investigative file, the first requestor seeks a copy of her personnel file, and the second requestor seeks copies of correspondence between the senate and Senate Media Services relating to three named individuals. The third requestor also seeks a copy of her personnel file and any other information relating to her employment. You state that you will release a copy of the responsive personnel files. You claim, however, that portions of the remaining responsive documents are protected from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the common-law right of privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

In accordance with *Ellen*, the senate must withhold all the submitted information except for pages 1 through 24 of Exhibit B and the alleged harassers' statements. Pages 1 through 24 of Exhibit B provide an adequate summary of the investigation into the alleged sexual harassment. These documents, however, would serve to identify the victims and individual witnesses of the alleged sexual harassment. Since the identities of the victim and the witnesses to the alleged sexual harassment are protected by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*, the names of these individuals must be withheld. However, we find that the public interest in the statements and the identities of the alleged harassers outweighs any privacy interest they may have in that information. See Open Records Decision Nos. 438 (1986) (stating that common-law privacy does not protect information about public employee's alleged misconduct on job or complaints made about employee's job performance), 230 (1979), 219 (1978). Therefore, the senate must release their statements with the identities of the victims and witnesses redacted.

Additionally, you argue that Exhibit B includes "medical diagnoses" that are protected from disclosure under section 552.101 in conjunction with the Medical Practice Act (the "MPA"). The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). After careful review, we find that none of the information in Exhibit B is subject to the MPA. We have, however, marked certain medical information that is protected from disclosure under common-law privacy. See Open Records Decision No. 470 (1987) (providing that certain kinds of medical information or illnesses is protected by right of privacy).

In conclusion, except for pages 1 through 24 of Exhibit B and the alleged harassers' statements, the senate must withhold all of the submitted information under section 552.101. Before releasing the summary and alleged harassers' statements, the senate must redact the names of the victims and witnesses of the alleged sexual harassment as well as, the marked medical information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

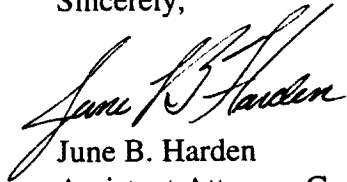
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 154178

Enc. Marked documents

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